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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re: NAMCO CAPITAL GROUP, INC., a California corporation, Debtor.	Case No. 2:11-cv-05320-GAF(CWx) Chapter 11 Bankr. Case No. 2:08-bk-32333-BR Bankr. Adv. No. 2:10-ap-02945-BR
BRADLEY D. SHARP, solely in his capacity as Liquidating Trustee of The Namco Liquidating Trust, Plaintiff, vs. MOUSA NAMVAR, <i>et al.</i> , Defendants.	[REVISED PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF JUDGMENT IN FAVOR OF PLAINTIFF BRADLEY D. SHARP, LIQUIDATING TRUSTEE OF THE NAMCO LIQUIDATING TRUST

**[REVISED PROPOSED]
FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN
SUPPORT OF JUDGMENT IN
FAVOR OF PLAINTIFF
BRADLEY D. SHARP,
LIQUIDATING TRUSTEE OF
THE NAMCO LIQUIDATING
TRUST**

1 Commencing on October 21, 2014, the Court held a two-day Trial on the
2 Eleventh Claim for Relief of the *First Amended Complaint for Damages, Equitable*
3 *Subordination, Declaratory and Injunctive Relief; Objection to Claims* in the
4 above-captioned action (the “Action”). Plaintiff Bradley D. Sharp, in his capacity
5 as the Liquidating Trustee (the “Trustee”) of The Namco Liquidating Trust, was
6 represented at the Trial by Alan J. Kornfeld and Elissa A. Wagner of Pachulski
7 Stang Ziehl & Jones LLP. Defendants Daniel Namvar, Benjamin Namvar, Malka
8 Namvar and Shirah Namvar (collectively, the “Defendants”) were represented at the
9 Trial by Douglas D. Kappler of Margulies Faith LLP. Having considered the
10 testimony of witnesses, documentary evidence and legal arguments presented by
11 counsel, the Court makes the following findings of fact and conclusions of law:

12

13

FINDINGS OF FACT

14

I. Procedural History

15

1 On December 22, 2008 (the “Petition Date”), certain creditors filed an
2 involuntary petition for relief under chapter 11 of title 11 of the United States Code
3 (the “Bankruptcy Code”) against Namco Capital Group, Inc. (“Namco”), a California
4 corporation, in the United States Bankruptcy Court for the Central District of
5 California (the “Bankruptcy Court”).

20

2 On the same date, certain creditors of Ezri Namvar (“Ezri”), the former
3 CEO and sole shareholder of Namco, filed an involuntary chapter 11 petition against
4 Ezri in the Bankruptcy Court. Defendants Daniel Namvar and Benjamin Namvar are
5 Ezri’s sons, and Defendants Malka Namvar and Shirah Namvar are Ezri’s daughters.
6 Ezri is currently incarcerated in federal prison, having been convicted of wire fraud in
7 connection with improper transfers of funds from one of Ezri’s 1031 exchange

8 companies, Namco Financial Exchange Corp. (“NFE”), to entities owned or
9 controlled by Ezri and her family members.

26

27 On May 8, 2009, the Bankruptcy Court approved the appointment of the
28 Trustee as the chapter 11 trustee in Namco’s chapter 11 case (the “Namco Case”).

1 The Bankruptcy Court also has approved the employment of Berkeley Research
2 Group, LLC ("BRG") to provide, among other things, forensic accounting services in
3 connection with the Namco Case.

4 4. In his capacity as the chapter 11 trustee for Namco, the Trustee
5 commenced this Action in the Bankruptcy Court in the Namco Case on October 26,
6 2010. On June 24, 2011, the Bankruptcy Court transferred the Action to this Court.

7 5. Following the confirmation of a joint liquidating plan in the Namco
8 Case, the Trustee has continued to prosecute this Action in his capacity as the
9 Liquidating Trustee of The Namco Liquidating Trust.

10 6. The Trustee's Eleventh Claim for Relief against the Defendants, which
11 seeks to avoid and recover certain transfers (collectively, the "Transfers") pursuant to
12 11 U.S.C. § 544(b)(1), 11 U.S.C. § 550, Cal. Civ. Code § 3439.05 and Cal. Civ. Code
13 § 3439.07, was the sole claim for relief presented at the Trial. All other defendants
14 previously named in the Action have settled with the Trustee and/or have been
15 voluntarily dismissed by the Trustee.

16

17 **II. Background Facts**

18 7. Prior to the Petition Date, Namco operated as an investment company
19 and commercial real estate lender. The majority of Namco's investors were
20 individuals who were members of the Persian community in Los Angeles. In
21 general, Namco's investors would, in exchange for their deposits, receive promissory
22 notes from Namco that typically were payable within 30 days of demand.

23 8. The vast majority of the funds Namco received from its investors were
24 used to purchase and subsidize a variety of real estate ventures owned directly or
25 indirectly by Ezri and his family members. Almost without exception, Namco did not
26 hold any ownership or security interests in those real estate ventures, and did not
27 receive any promissory notes, loan agreements or deeds of trust in exchange for the
28

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which included millions of dollars of investor deposits.

1 use of its funds. Moreover, Namco received only sporadic (if any) interest payments
2 in connection with the funds it advanced for the Namvar family's real estate ventures.

3 9. Namco's profits, if any, were to be derived from the difference between
4 the interest owed to Namco's investors and the interest due to Namco via its "lending"
5 activities. With the bulk of Namco's "lending" activities concentrated in the Namvar
6 family's long-term real estate ventures, however, and with no notes, equity interests,
7 deeds of trust or other security interests, or stated repayment terms to protect Namco,
8 this "business model" ultimately proved unsustainable.

9 10. The total amount of unsecured claims asserted in the Namco Case
10 exceeds \$1 billion, with in excess of \$238 million of claims to be allowed in the
11 Namco Case. *See Tr. Exh. 898.*

12

13 **III. The Transfers To Or For the Benefit of the Defendants**

14 11. Namco's financial books and records were maintained using the
15 QuickBooks software program ("QuickBooks"). Namco's general ledger is a
16 representation of the accounting entries contained within Namco's QuickBooks
17 records. *See Tr. Exh. 1995.* The Trustee's accounting professionals have determined
18 that Namco's QuickBooks records and general ledger are consistent with Namco's
19 bank records, and accurately reflect Namco's financial transactions.

20 12. The following QuickBooks accounts were maintained for the
21 Defendants: (a) all transfers and repayments attributable to Daniel Namvar were
22 maintained on Namco's books using account number 132.07; (b) all transfers and
23 repayments attributable to Benjamin Namvar were maintained on Namco's books
24 using account number 132.06; (c) all transfers and repayments attributable to Malka
25 Namvar were maintained on Namco's books using account number 132.08; and (d)
26 all transfers and repayments attributable to Shirah Namvar were maintained on
27 Namco's books using account number 132.09. *See Tr. Exh. 947-950.*

28

1 13. With respect to Daniel Namvar, Namco's general ledger reflects that
 2 Daniel Namvar owed approximately \$50.6 million to Namco as of the Petition Date.
 3 *See Tr. Exh. 947.* After the Petition Date, \$20 million of that amount was written off
 4 as a bad debt. *Id.*

5 14. At the Trial, the Defendants stipulated on the record that, between April
 6 17, 2006 and January 22, 2008, Namco made the following Transfers of its funds,
 7 totaling \$1,205,000, to Daniel Namvar or to taxing authorities on behalf of Daniel
 8 Namvar (collectively, the "Daniel Transfers"):

Date	Amount	Payee	Account No.
April 17, 2006	\$75,000	U.S. Treasury	132.07 – Daniel Namvar
April 17, 2006	\$125,000	Franchise Tax Board	132.07 – Daniel Namvar
June 16, 2006	\$140,000	Daniel Namvar	132.07 – Daniel Namvar
January 23, 2007	\$220,000	Daniel Namvar	132.07 – Daniel Namvar
April 17, 2007	\$400,000	U.S. Treasury	132.07 – Daniel Namvar
April 17, 2007	\$100,000	Franchise Tax Board	132.07 – Daniel Namvar
August 29, 2007	\$15,000	Daniel Namvar	132.07 – Daniel Namvar
January 22, 2008	\$130,000	Daniel Namvar	132.07 – Daniel Namvar

16 *See Tr. Exh. 2007.* Each Daniel Transfer was made by Namco to or for the benefit of
 17 Daniel Namvar.

18 15. Daniel Namvar owed in excess of \$50 million to Namco at the time of
 19 each of the Daniel Transfers. *See Tr. Exh. 947, 947A.* Although the Daniel
 20 Transfers are identified in Namco's QuickBooks records as receivables due from
 21 Daniel Namvar, Namco was not repaid for the Daniel Transfers, and did not receive
 22 any promissory notes, written agreements, verbal repayment promises, deeds of trust
 23 or other collateral, or anything else of value in exchange for the Daniel Transfers.
 24 Moreover, Daniel Namvar has not provided any goods or services to Namco, and has
 25 not transferred any of his ownership interests in any LLCs to Namco or the Trustee.
 26 Based on these facts, which the Trustee established by a preponderance of the
 27 evidence, Namco did not receive reasonably equivalent value in exchange for the
 28 Daniel Transfers.

1 16. With respect to Benjamin Namvar, Namco's general ledger reflects that
 2 Benjamin Namvar owed approximately \$52.2 million to Namco as of the Petition
 3 Date. *See* Tr. Exh. 948. After the Petition Date, \$20 million of that amount was
 4 written off as a bad debt. *Id.*

5 17. At the Trial, the Defendants stipulated on the record that, between April
 6 17, 2006 and January 22, 2008, Namco made the following Transfers of its funds,
 7 totaling \$1,660,000, to Benjamin Namvar or to taxing authorities on behalf of
 8 Benjamin Namvar (collectively, the "Benjamin Transfers"):

Date	Amount	Payee	Account No.
April 17, 2006	\$80,000	Franchise Tax Board	132.06 – Benjamin Namvar
April 17, 2006	\$120,000	U.S. Treasury	132.06 – Benjamin Namvar
June 16, 2006	\$150,000	Benjamin Namvar	132.06 – Benjamin Namvar
October 17, 2006	\$340,000	Benjamin Namvar	132.06 – Benjamin Namvar
January 23, 2007	\$230,000	Benjamin Namvar	132.06 – Benjamin Namvar
April 17, 2007	\$400,000	U.S. Treasury	132.06 – Benjamin Namvar
April 17, 2007	\$100,000	Franchise Tax Board	132.06 – Benjamin Namvar
January 22, 2008	\$240,000	Benjamin Namvar	132.06 – Benjamin Namvar

16 See Tr. Exh. 2004. Each Benjamin Transfer was made by Namco to or for the benefit
 17 of Benjamin Namvar.

18 18. Benjamin Namvar owed in excess of \$50 million to Namco at the time of
 19 each of the Benjamin Transfers. *See* Tr. Exh. 948, 948A. Although the Benjamin
 20 Transfers are identified in Namco's QuickBooks records as receivables due from
 21 Benjamin Namvar, Namco was not repaid for the Benjamin Transfers, and did not
 22 receive any promissory notes, written agreements, verbal repayment promises, deeds
 23 of trust or other collateral, or anything else of value in exchange for the Benjamin
 24 Transfers. Moreover, Benjamin Namvar has not provided any goods or services to
 25 Namco, and has not transferred any of his ownership interests in any LLCs to Namco
 26 or the Trustee. Based on these facts, which the Trustee established by a
 27 preponderance of the evidence, Namco did not receive reasonably equivalent value in
 28 exchange for the Benjamin Transfers.

1 19. With respect to Malka Namvar, Namco's general ledger reflects that
 2 Malka Namvar owed approximately \$50.6 million to Namco as of the Petition Date.
 3 See Tr. Exh. 949. After the Petition Date, \$20 million of that amount was written off
 4 as a bad debt. *Id.*

5 20. At the Trial, the Defendants stipulated on the record that, between April
 6 17, 2006 and January 22, 2008, Namco made the following Transfers of its funds,
 7 totaling \$1,210,000, to Malka Namvar or to taxing authorities on behalf of Malka
 8 Namvar (collectively, the "Malka Transfers"):

Date	Amount	Payee	Account No.
April 17, 2006	\$75,000	U.S. Treasury	132.08 – Malka Namvar
April 17, 2006	\$125,000	Franchise Tax Board	132.08 – Malka Namvar
June 16, 2006	\$140,000	Malka Namvar	132.08 – Malka Namvar
January 23, 2007	\$220,000	Malka Namvar	132.08 – Malka Namvar
March 2, 2007	\$1,000	Malka Namvar	132.08 – Malka Namvar
April 17, 2007	\$400,000	U.S. Treasury	132.08 – Malka Namvar
April 17, 2007	\$100,000	Franchise Tax Board	132.08 – Malka Namvar
May 4, 2007	\$4,000	Malka Namvar	132.08 – Malka Namvar
August 29, 2007	\$15,000	Malka Namvar	132.08 – Malka Namvar
January 22, 2008	\$130,000	Malka Namvar	132.08 – Malka Namvar

18 See Tr. Exh. 2010. Each Malka Transfer was made by Namco to or for the benefit of
 19 Malka Namvar.

20 21. Malka Namvar owed in excess of \$50 million to Namco at the time of
 21 each of the Malka Transfers. See Tr. Exh. 949, 949A. Although the Malka Transfers
 22 are identified in Namco's QuickBooks records as receivables due from Malka
 23 Namvar, Namco was not repaid for the Malka Transfers, and did not receive any
 24 promissory notes, written agreements, verbal repayment promises, deeds of trust or
 25 other collateral, or anything else of value in exchange for the Malka Transfers.
 26 Moreover, Malka Namvar has not provided any goods or services to Namco, and has
 27 not transferred any of her ownership interests in any LLCs to Namco or the Trustee.
 28 Based on these facts, which the Trustee established by a preponderance of the

1 evidence, Namco did not receive reasonably equivalent value in exchange for the
2 Malka Transfers.

3 22. With respect to Shirah Namvar, Namco's general ledger reflects that
4 Shirah Namvar owed approximately \$50.6 million to Namco as of the Petition Date.
5 See Tr. Exh. 950. After the Petition Date, \$20 million of that amount was written off
6 as a bad debt. *Id.*

7 23. At the Trial, the Defendants stipulated on the record that, between April
8 17, 2006 and January 22, 2008, Namco made the following Transfers of its funds,
9 totaling \$1,212,000, to Shirah Namvar or to taxing authorities on behalf of Shirah
10 Namvar (collectively, the "Shirah Transfers"):

Date	Amount	Payee	Account No.
April 17, 2006	\$125,000	Franchise Tax Board	132.09 – Shirah Namvar
April 17, 2006	\$75,000	U.S. Treasury	132.09 – Shirah Namvar
June 16, 2006	\$140,000	Shirah Namvar	132.09 – Shirah Namvar
January 23, 2007	\$220,000	Shirah Namvar	132.09 – Shirah Namvar
April 17, 2007	\$400,000	U.S. Treasury	132.09 – Shirah Namvar
April 17, 2007	\$100,000	Franchise Tax Board	132.09 – Shirah Namvar
May 4, 2007	\$2,000	Shirah Namvar	132.09 – Shirah Namvar
August 29, 2007	\$20,000	Shirah Namvar	132.09 – Shirah Namvar
January 22, 2008	\$130,000	Shirah Namvar	132.09 – Shirah Namvar

19 See Tr. Exh. 2013. Each Shirah Transfer was made by Namco to or for the benefit of
20 Shirah Namvar.

21 24. Shirah Namvar owed in excess of \$50 million to Namco at the time of
22 each of the Shirah Transfers. See Tr. Exh. 950, 950A. Although the Shirah Transfers
23 are identified in Namco's QuickBooks records as receivables due from Shirah
24 Namvar, Namco was not repaid for the Shirah Transfers, and did not receive any
25 promissory notes, written agreements, verbal repayment promises, deeds of trust or
26 other collateral, or anything else of value in exchange for the Shirah Transfers.
27 Moreover, Shirah Namvar has not provided any goods or services to Namco, and has
28 not transferred any of her ownership interests in any LLCs to Namco or the Trustee.

1 Based on these facts, which the Trustee established by a preponderance of the
2 evidence, Namco did not receive reasonably equivalent value in exchange for the
3 Shirah Transfers.

4A. In sum, Egri's four children received from
5 Namco \$5,287,000 between April 17, 2006 and
IV. Namco's Insolvency January 22, 2008.

6 25. At the Trial, David H. Judd, a Director at BRG, provided expert
7 testimony on behalf of the Trustee regarding Namco's insolvency at the time of each
8 of the Transfers.

9 26. Mr. Judd opined that, as of March 31, 2006, the amount of Namco's
10 liabilities – which included a \$119 million payable to NFE and substantial interest
11 payments owed to various LLCs – exceeded the fair value of Namco's assets – which
12 consisted primarily of unpaid, undocumented and uncollateralized receivables owed
13 by the Namvar family – by no less than approximately \$4.1 million to \$5.2 million.
14 See Tr. Exh. 153 at pgs. 3, 16, 18.

15 27. This amount was conservative, in that it did not include any allowance
16 for doubtful accounts. It is a common practice among lenders to record an allowance
17 for non-collectability of receivables. As of March 31, 2006, Namco's account
18 receivables totaled approximately \$515 million. For every 1% allowance for doubtful
19 accounts, the net value of Namco's receivables would decrease, and Namco's
20 insolvency would increase, by approximately \$5 million. A modest 5% allowance for
21 doubtful accounts, which would not be unreasonable in this case, would decrease the
22 net value of Namco's receivables, and increase Namco's insolvency, by
23 approximately \$25 million.

24 28. Mr. Judd also opined that Namco's financial condition and access to
25 capital did not improve or change after March 31, 2006, and that Namco therefore was
26 insolvent on all dates after March 31, 2006. See Tr. Exh. 153 at pgs. 3, 23-26. Mr.
27 Judd's opinion in this regard was based on, among other things: the ongoing lack of
28 documentation for Namco's receivables; the overwhelming percentage of receivables

1 due from Namvar family members; the speculative nature of the Namvar family's real
2 estate ventures; the steep decline in the real estate market beginning in 2007; and
3 Namco's negative cash flows in 2007 and 2008. *Id.*

4 29. Mr. Judd testified that, in evaluating Namco's financial condition, he
5 used the "orderly disposition" valuation method. *See also* Tr. Exh. 153 at pgs. 9-10.
6 The "orderly disposition" valuation method is appropriate where the likelihood that an
7 entity's assets will generate future positive cash flow is so remote that a potential
8 buyer would not evaluate the entity's assets based on their ability to generate future
9 cash flows. *Id.*

10 30. Mr. Judd's testimony regarding Namco's insolvency and his application
11 of the "orderly disposition" valuation method was credible and consistent with
12 Namco's financial records and other evidence presented at the Trial, which established
13 the following:

14 a. Namco's assets consisted primarily of open receivables due from
15 Namvar family members, most (if not all) of which were not
16 supported by signed notes or other loan documentation, stated
17 payment terms for principal or interest, or deeds of trust or other
18 security agreements. Many of Namco's receivables remained
19 unpaid, and even increased, between March 31, 2006 and the
20 Petition Date; some of those receivables also had existed for many
21 years prior to March 31, 2006. Accordingly, Namco's receivables
22 were not "current assets," *i.e.*, assets that could be converted to cash
23 within one year.

24 b. As of March 31, 2006, Namco's only current asset was its cash.
25 Even accepting the cash balance identified by the Defendants'
26 expert witness, Namco had only \$4 million of cash as of March 31,
27 2006. *See* Tr. Exh. 2032.

- 1 c. As of March 31, 2006, Namco's liabilities totaled between \$527.9
2 million, if accrued interest payable is excluded from the analysis,
3 and \$552.4 million, if accrued interest payable is included in the
4 analysis. *See* Tr. Exh. 153 at pgs. 16, 18. At least \$323 million of
5 Namco's liabilities were current liabilities payable on demand
6 within 30 days to Namco's investors, or within 180 days to Ezri's
7 1031 exchange companies. Thus, as of March 31, 2006, Namco
8 did not have sufficient current assets to satisfy its current
9 liabilities.
- 10 d. Namco's financial condition and access to capital did not improve
11 after March 31, 2006. In particular, Namco remained unable to
12 convert its undocumented, uncollateralized receivables into cash.
13 Between December 31, 2004 and December 31, 2007, Namco's
14 unadjusted account receivables increased from approximately
15 \$308.7 million to approximately \$527.5 million. *See* Tr. Exh.
16 1995 at pgs. P12532, P13451; *see also* Tr. Exh. 2031 at pg. 58.
17 Namco's unadjusted interest receivables also continued to increase,
18 from \$8.1 million as of December 31, 2004 to \$52.6 million as of
19 December 31, 2007. *See* Tr. Exh. 1995 at pgs. P12487, P13400;
20 *see also* Tr. Exh. 2031 at pg. 58.
- 21 e. Finally, Namco was cash flow negative, in significant amounts,
22 from 2005 through 2008. *See* Tr. Exh. 153 at pg. 10. Between
23 December 31, 2005 and December 31, 2007, Namco lost
24 approximately \$31.2 million in cash. *See* Tr. Exh. 2031 at pg. 46.
25 By December 31, 2007, Namco's cash balance was negative
26 \$100,000. *See* Tr. Exh. 2032.

27 31. In an effort to rebut Mr. Judd's opinions regarding Namco's insolvency,
28 the Defendants offered the testimony and report of their expert witness, Jason A.

1 Engel. *See* Tr. Exh. 2031, 2032. Mr. Engel testified that, in his opinion, Namco
2 remained solvent through 2008, and should have been evaluated as a going concern.
3 The Court finds that Mr. Engel's testimony lacked credibility and was not supported
4 by the evidence presented at the Trial, for the following reasons:

- 5 a. Mr. Engel testified that, in his opinion, Namco was solvent through
6 2008, yet candidly admitted that he had not performed a solvency
7 analysis to determine the date on which Namco became insolvent.
- 8 b. Mr. Engel opined that Namco should be evaluated as a going
9 concern because, among other reasons, negative cash flows are in
10 the ordinary course of business for developers and construction
11 lenders. Mr. Engel, however, ignored the uncontroverted evidence
12 regarding Namco's business and operations: Namco was not a real
13 estate developer, as Namco almost without exception did not own
14 any interests in the real estate projects it funded; and Namco did
15 not operate as a "typical" construction lender, in that Namco's
16 lending was concentrated among members of the Namvar family
17 or their related LLCs (many of which were controlled by Ezri),
18 Namco's lending was not documented or secured by deeds of trust
19 or other security agreements, and Namco did not receive regular
20 interest or principal payments.
- 21 c. Mr. Engel testified that the value of Namco's accounts receivable
22 was dependent upon the value of the real estate owned by the
23 Namvar family members or their related LLCs. Mr. Engel's
24 testimony in this regard was misleading and not supported by the
25 evidence, which established that Namco's loans to Namvar family
26 members or their related LLCs were not documented or secured by
27 deeds of trust or any other interest in the real estate owned by the
28 Namvar family members or their related LLCs.

- 1 d. Mr. Engel admitted that he did not make any effort to determine
2 the value or collectability of Namco's account receivables.
- 3 e. When faced with the undisputed evidence that Namco's current
4 liabilities exceeded Namco's current assets as of March 31, 2006,
5 Mr. Engel attempted to avoid acknowledging the generally
6 accepted definition of a "current" asset.
- 7 f. Mr. Engel testified that, in his opinion, Namco's financial
8 performance should have been measured using accrual basis
9 accounting, instead of cash basis accounting. Accrual basis
10 accounting, as it pertains to interest receivable, is based on the
11 premise that amounts owed to a company will, in fact, be paid.
12 Here, the overwhelming majority of Namco's receivables were
13 open (unpaid) accounts with no notes, no deeds of trust or other
14 security agreements, and no stated terms for principal or interest
15 payments. Namco received interest payments only sporadically, if
16 at all. Under these circumstances, accrual basis accounting would
17 vastly overstate the value of Namco's interest receivable.
- 18 g. Mr. Engel criticized Mr. Judd's insolvency opinions on the
19 grounds that, according to Mr. Engel, Mr. Judd used hindsight to
20 determine Namco's insolvency as of March 31, 2006. As an initial
21 matter, the Court rejected this argument prior to the Trial. *See*
22 Docket No. 413. Moreover, in an effort to pump up the value of
23 Namco's assets, Mr. Engel himself used hindsight to add
24 approximately \$29 million to the value of Namco's assets as of
25 March 31, 2006, based on gains purportedly realized from the sale
26 of those assets in 2008. Mr. Engel, however, did not apply this
27 hindsight where doing so would decrease the value of Namco's
28 assets. As stated above, Mr. Engel did not analyze the

1 collectability of Namco's receivables or determine the percentage
2 or amount of receivables that were outstanding as of March 31,
3 2006 and remained uncollected in 2008.

- 4 h. Mr. Engel also challenged Mr. Judd's insolvency opinions on the
5 grounds that, according to Mr. Engel, Namco satisfied its
6 obligations to its creditors until late 2008. As established by Mr.
7 Judd's testimony, however, Namco was only able to satisfy its
8 obligations to some of its creditors by neglecting to fulfill its
9 obligations to other creditors between March 31, 2006 and the
10 Petition Date, including substantial amounts owed to Ezri's 1031
11 exchange companies and significant interest payments owed to
12 various LLCs. Moreover, Mr. Engel admitted that, in evaluating
13 Namco's liabilities, Mr. Engel did not take into account any
14 accrued interest payable to Ezri's 1031 exchange companies, even
15 though Namco's financial records reflected an accrued interest
16 payable to the 1031 exchange companies.
- 17 i. Finally, Mr. Engel opined that the Trustee's First Financial Report,
18 which was filed in the Namco Case in February 2010, supports an
19 insolvency date in 2007 or 2008, rather than 2006. Mr. Engel
20 ignored, however, numerous statements in the First Financial
21 Report that identify early 2006 as the "breaking point" for Namco.
22 *See, e.g., Tr. Exh. 2030 at pg. 7 ("Once this downward trend
23 crossed the break-even point in April 2006, when cumulative
24 interest paid by Namco to its creditor/investors continuously
25 exceeded cumulative interest earned by Namco on its investment
26 portfolio, Namco started the descent into bankruptcy and never
27 recovered."); Tr. Exh. 2030 at pg. 8 (... "in April 2006 the interest
28 paid to creditor/investors exceeded the interest income being*

1 received from all other sources. At this point in time Namco was
2 descending into a monthly spiral of increasing expenses and
3 decreasing income.”). Therefore, Mr. Judd’s opinions regarding
4 Namco’s insolvency – in particular, that Namco was insolvent as
5 of March 31, 2006 and all dates thereafter – are entirely consistent
6 with the First Financial Report.

7 32. For the reasons set forth above, the Court accepts the opinions expressed
8 by Mr. Judd, and finds that the Trustee established by a preponderance of the evidence
9 that, as of March 31, 2006, Namco was insolvent by at least approximately \$4.1
10 million to \$5.2 million, and remained insolvent on all dates thereafter.

11

12 **V. Namco’s Creditors**

13 33. At the Trial, the Defendants stipulated on the record that Namco had at
14 least one creditor with an unsecured claim that existed as of the date of Namco’s
15 insolvency, remained in existence as of the Petition Date, and has been allowed in the
16 Namco Case.

17

18 **VI. Prejudgment Interest**

19 34. The principal amounts due and owing to Namco from each of the
20 Defendants are liquidated and undisputed, and the Defendants have stipulated as to
21 the amounts and dates of each of the Transfers. Accordingly, an award of
22 prejudgment interest from the date each Transfer was made is appropriate in this case
23 to compensate Namco’s estate and its creditors for the loss of use of the funds that
24 were fraudulently transferred to or for the benefit of the Defendants, and wrongfully
25 withheld from Namco and its creditors.

26 35. For the sake of calculation, prejudgment interest has been calculated
27 from the date of each of the Transfers through October 31, 2014, using the
28 following formula: (a) the per diem interest on each Transfer was determined by

1 multiplying the principal amount of the Transfer by the applicable interest rate
2 (here, 7% per annum), and dividing by 365 days in a year; and then (b) multiplying
3 that factor by the number of days between the date of the Transfer and October 31,
4 2014. *See* Tr. Exh. 2020, Tr. Exh. 2021, Tr. Exh. 2022, and Tr. Exh. 2023.

5 36. Using this formula, the total amount of prejudgment interest awarded in
6 favor of the Trustee against each of the Defendants through October 31, 2014 is as
7 follows: against Daniel Namvar, prejudgment interest in the amount of \$654,805
8 (*see* Tr. Exh. 2021); against Benjamin Namvar, prejudgment interest in the amount
9 of \$902,212 (*see* Tr. Exh. 2020); against Malka Namvar, prejudgment interest in the
10 amount of \$657,442 (*see* Tr. Exh. 2022); and against Shirah Namvar, prejudgment
11 interest in the amount of \$658,367 (*see* Tr. Exh. 2023).

12 37. The per diem amount of prejudgment interest against each Defendant for
13 each day from November 1, 2014 to the entry of judgment in this Action is as
14 follows: against Daniel Namvar, a per diem amount of \$231.10 (*see* Tr. Exh. 2021);
15 against Benjamin Namvar, a per diem amount of \$318.36 (*see* Tr. Exh. 2020); against
16 Malka Namvar, a per diem amount of \$232.05 (*see* Tr. Exh. 2022); and against
17 Shirah Namvar, a per diem amount of \$232.44 (*see* Tr. Exh. 2023).

18 38. Any Finding of Fact set forth herein that may qualify as a Conclusion of
19 Law shall be equally considered as such.

20

21 **CONCLUSIONS OF LAW**

22 **I. Jurisdiction and Venue**

23 1. The Court has jurisdiction over this Action pursuant to 28 U.S.C. § 1334,
24 and has personal jurisdiction over the Trustee and each of the Defendants.

25 2. Venue in this district is proper pursuant to 28 U.S.C. § 1409(a).

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1 **II. The Trustee is Entitled to Avoid Each of the Transfers**

2 3. Pursuant to 11 U.S.C. § 544(b)(1), a trustee “may avoid any transfer of
3 an interest of the debtor in property ... that is voidable under applicable law by a
4 creditor holding an unsecured claim that is allowable under section 502 of this title or
5 that is not allowable only under section 502(e) of this title.” 11 U.S.C. § 544(b)(1).
6 Here, the Trustee seeks to avoid the Transfers pursuant to 11 U.S.C. § 544(b)(1) and
7 California’s Uniform Fraudulent Transfer Act, Cal. Civ. Code § 3439 *et seq.*

8 4. Cal. Civ. Code § 3439.05 provides that a “transfer made or obligation
9 incurred by a debtor is fraudulent as to a creditor whose claim arose before the
10 transfer was made or the obligation was incurred if the debtor made the transfer or
11 incurred the obligation without receiving a reasonably equivalent value in exchange
12 for the transfer or obligation and the debtor was insolvent at that time or the debtor
13 became insolvent as a result of the transfer or obligation.” Cal. Civ. Code § 3439.05.
14 Pursuant to Cal. Civ. Code § 3439.07(a)(1), a creditor is entitled to avoid a transfer
15 that is fraudulent as to that creditor. Cal. Civ. Code § 3439.07(a)(1).

16 5. Thus, to avoid the Transfers pursuant to section 544(b)(1) of the
17 Bankruptcy Code and sections 3439.05 and 3439.07(a)(1) of California’s Uniform
18 Fraudulent Transfer Act, the Trustee must prove, as to each Transfer, that: (a) Namco
19 made the Transfer without receiving a reasonably equivalent value in exchange; (b)
20 Namco was insolvent at the time of the Transfer, or became insolvent as a result of the
21 Transfer; and (c) at least one creditor of Namco held an unsecured, allowable claim
22 against Namco that arose before the Transfer was made.

23 6. The Trustee bears the burden of proving each of these elements by a
24 preponderance of the evidence. As discussed below, the Trustee has met this burden
25 as to each of the Transfers.

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1 A. **Namco Did Not Receive Reasonably Equivalent Value in Exchange**
2 **for the Transfers**

3 7. In determining whether a debtor received “reasonably equivalent value”
4 in exchange for a transfer, the analysis is “directed at what the debtor surrendered and
5 what the debtor received irrespective of what any third party may have gained or lost.”
6 *In re United Energy Corp.*, 944 F.2d 589, 597 (9th Cir. 1991) (citations and internal
7 quotations omitted). In this case, as outlined in the Findings of Fact, the evidence
8 presented at the Trial established that Namco was not repaid for the Transfers, and did
9 not receive any goods, services or anything else of value in exchange for the
10 Transfers.

11 8. Although Namco recorded the Transfers as receivables due from the
12 Defendants, an account receivable cannot constitute reasonably equivalent value if the
13 account receivable is doubtful or uncollectible. *See, e.g., In re USA Commercial*
14 *Mortg. Co.*, 439 F. App’x 670, 671-72 (9th Cir. 2011) (debtor did not receive
15 reasonably equivalent value for prepetition transfer, even though transfer was
16 identified in debtor’s general ledger as account receivable, because repayment
17 promise was undocumented, party responsible for receivable was not recorded and its
18 ability to pay receivable “would have been in doubt”). Here, the Transfers were
19 undocumented, with no collateral, written terms or even verbal repayment promises,
20 and were made at times when each of the Defendants owed in excess of \$50 million to
21 Namco. Under these circumstances, the identification of the Transfers as receivables
22 in Namco’s accounting records did not constitute reasonably equivalent value to
23 Namco.

24 9. Therefore, the Trustee has met his burden of establishing by a
25 preponderance of the evidence that Namco did not receive reasonably equivalent
26 value in exchange for any of the Transfers.

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1 **B. Namco Was Insolvent at the Time of Each of the Transfers**

2 10. Section 101(32)(A) of the Bankruptcy Code defines the insolvency of a
3 corporation, such as Namco, as a “financial condition such that the sum of such
4 entity’s debts is greater than all of such entity’s property, at a fair valuation.” 11
5 U.S.C. § 101(32)(A). Similarly, section 3439.02(a) of California’s Uniform
6 Fraudulent Transfer Act provides that a “debtor is insolvent if, at fair valuations, the
7 sum of the debtor’s debts is greater than all of the debtor’s assets.” Cal. Civ. Code §
8 3439.02(a).

9 11. As set forth in the Findings of Fact, the Trustee has established that: (a)
10 each of the Transfers was made on or after April 17, 2006; (b) as of March 31, 2006,
11 the amount of Namco’s liabilities exceeded the fair value of Namco’s assets by at least
12 approximately \$4.1 million to \$5.2 million; and (c) Namco’s financial condition and
13 access to capital did not improve or change subsequent to March 31, 2006. Therefore,
14 the Trustee has established by a preponderance of the evidence that Namco was
15 insolvent at the time of each of the Transfers.

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18 **C. At Least One Creditor of Namco Was Entitled to Avoid Each of the**
Transfers Under California Law

19 12. Under 11 U.S.C. § 544(b)(1) and Cal. Civ. Code § 3439.05, the Trustee
20 must identify at least one creditor of Namco with an allowable, unsecured claim
21 against Namco that arose before each Transfer was made. *See* 11 U.S.C. § 544(b)(1)
22 (trustee “may avoid any transfer of an interest of the debtor in property ... that is
23 voidable under applicable law by a creditor holding an unsecured claim that is
24 allowable under section 502 of this title or that is not allowable only under section
25 502(e) of this title”); Cal. Civ. Code § 3439.05 (a “transfer made or obligation
26 incurred by a debtor is fraudulent as to a creditor whose claim arose before the
27 transfer was made or the obligation was incurred ...”).

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1 13. As set forth in the Findings of Fact, the Defendants stipulated at the Trial
2 that at least one creditor held an unsecured claim against Namco that existed as of the
3 insolvency date (March 31, 2006), remained in existence as of the Petition Date
4 (December 22, 2008), and has been allowed in the Namco Case. Each Transfer at
5 issue in this Action was made between April 17, 2006 and January 22, 2008.
6 Therefore, at least one creditor of Namco held an allowable, unsecured claim against
7 Namco that arose before each Transfer was made.

8 14. In sum, the Trustee has established by a preponderance of the evidence
9 that the Trustee is entitled to avoid each of the Transfers pursuant to 11 U.S.C. §
10 544(b)(1), Cal. Civ. Code § 3439.05 and Cal. Civ. Code § 3439.07.

11

12 **III. The Trustee is Entitled to Recover the Transfers from the Defendants**

13 15. The Trustee may recover the value of an avoided transfer from the
14 “initial transferee” of the transfer or from the “entity for whose benefit” the transfer
15 was made. 11 U.S.C. § 550(a)(1).

16 16. With certain exceptions not relevant to this Action, if a debtor’s funds are
17 paid by check directly to an individual, that individual is the “initial transferee” of the
18 transfer. If, on the other hand, a debtor’s funds are paid by check directly to an
19 individual’s creditor, the individual is the “entity for whose benefit” the transfer was
20 made. *See, e.g., In re Video Depot, Ltd.*, 186 B.R. 126, 132 (Bankr. W.D. Wash.
21 1995) subsequently aff’d, 127 F.3d 1195 (9th Cir. 1997) (where an individual directly
22 receives the debtor’s funds, the individual is the “initial transferee” of the transfer, and
23 where the debtor’s funds are paid directly to an individual’s creditor, the individual is
24 the “entity for whose benefit” the transfer was made).

25 17. As set forth in the Findings of Fact, the Defendants stipulated on the
26 record that Namco made the Daniel Transfers to Daniel Namvar or to taxing
27 authorities on behalf of Daniel Namvar. Thus, as to each of the Daniel Transfers,
28 Daniel Namvar was either the “initial transferee” or the “entity for whose benefit” the

1 Daniel Transfers were made. Accordingly, the Trustee is entitled to recover each of
2 the Daniel Transfers, in the total principal amount of \$1,205,000, from Daniel Namvar
3 pursuant to 11 U.S.C. § 550(a)(1).

4 18. The Defendants also stipulated on the record that Namco made the
5 Benjamin Transfers to Benjamin Namvar or to taxing authorities on behalf of
6 Benjamin Namvar. Thus, as to each of the Benjamin Transfers, Benjamin Namvar
7 was either the “initial transferee” or the “entity for whose benefit” the Benjamin
8 Transfers were made. Accordingly, the Trustee is entitled to recover each of the
9 Benjamin Transfers, in the total principal amount of \$1,660,000, from Benjamin
10 Namvar pursuant to 11 U.S.C. § 550(a)(1).

11 19. As to Malka Namvar, the Defendants stipulated on the record that Namco
12 made the Malka Transfers to Malka Namvar or to taxing authorities on behalf of
13 Malka Namvar. Thus, as to each of the Malka Transfers, Malka Namvar was either
14 the “initial transferee” or the “entity for whose benefit” the Malka Transfers were
15 made. Accordingly, the Trustee is entitled to recover each of the Malka Transfers, in
16 the total principal amount of \$1,210,000, from Malka Namvar pursuant to 11 U.S.C. §
17 550(a)(1).

18 20. Finally, as to Shirah Namvar, the Defendants stipulated on the record that
19 Namco made the Shirah Transfers to Shirah Namvar or to taxing authorities on behalf
20 of Shirah Namvar. Thus, as to each of the Shirah Transfers, Shirah Namvar was either
21 the “initial transferee” or the “entity for whose benefit” the Shirah Transfers were
22 made. Accordingly, the Trustee is entitled to recover each of the Shirah Transfers, in
23 the total principal amount of \$1,212,000, from Shirah Namvar pursuant to 11 U.S.C. §
24 550(a)(1).

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1 **IV. The Trustee is Entitled to Prejudgment Interest at 7% Per Annum from**
2 **the Date of Each Transfer**

3 21. An award of prejudgment interest in a fraudulent transfer action brought
4 under 11 U.S.C. § 544(b)(1) is determined by reference to applicable state law. *See In*
5 *re Agric. Research & Tech. Group, Inc.*, 916 F.2d 528, 541 (9th Cir. 1990) (state law
6 “regarding prejudgment interest is applicable via 11 U.S.C. § 544(b)).

7 22. Under California law, prejudgment interest on the Trustee’s fraudulent
8 transfer claims is a matter of discretion for this Court. *See Cal. Civ. Code § 3288* (in
9 “an action for the breach of an obligation not arising from contract, and in every case
10 of oppression, fraud, or malice, interest may be given, in the discretion of the jury”);
11 *see also In re Slatkin*, 243 F. App’x 255, 259 (9th Cir. 2007) (prejudgment interest in
12 action under 11 U.S.C. § 544(b) is “within the sound discretion of the trial court”).

13 23. As outlined in the Findings of Fact, prejudgment interest is appropriate in
14 this Action because an “award of prejudgment interest to the trustee would
15 unquestionably serve to compensate [Namco’s] estate for [Defendants’] use of those
16 funds that were wrongfully withheld” from Namco and its creditors. *In re Acequia,*
17 *Inc.*, 34 F.3d 800, 818-819 (9th Cir. 1994) (citations and quotations omitted); *see also*
18 *In re Richmond Produce Co., Inc.*, 195 B.R. 455, 465 (N.D. Cal. 1996) (award of
19 prejudgment interest is appropriate to compensate debtor’s estate for the loss of use of
20 fraudulently transferred funds); *In re Fehrs*, 391 B.R. 53, 76-77 (Bankr. D. Idaho
21 2008) (prejudgment interest on fraudulent transfer claims was appropriate “given that
22 the function of the judgment is to restore the estate to the financial condition that it
23 would have enjoyed but for the improper transfer” and, absent interest from the date
24 of the fraudulent transfer to the date of judgment, “the estate is not made whole”).

25 24. The calculation of the amount of prejudgment interest to be awarded on
26 the Trustee’s claims also is governed by California law. *See In re Agric. Research &*
27 *Tech. Group, Inc.*, 916 F.2d at 541 (calculating prejudgment interest by reference to
28 applicable state law). Under California law, if California statutes do not establish a

1 rate of prejudgment interest for a particular type of claim, the interest rate defaults to
2 7% per annum. *See Cal. Const. art. XV, § 1* (“In the absence of the setting of such
3 rate by the Legislature, the rate of interest on any judgment rendered in any court of
4 the state shall be 7 percent per annum.”). California statutes do not set forth a rate of
5 prejudgment interest for fraud claims. *See Michelson v. Hamada*, 29 Cal. App. 4th
6 1566, 1585 (1994) (there “is no legislative act specifying the rate of prejudgment
7 interest for a fraud claim, and therefore the constitutional rate of 7 percent applies”).
8 Therefore, California’s default rate of 7% per annum applies to the award of
9 prejudgment interest in this Action. *See In re Slatkin*, 243 F. App’x at 259-260
10 (bankruptcy court reasonably awarded prejudgment interest on fraudulent transfer
11 claims at the California rate of 7% per annum).

12 25. California law also provides for prejudgment interest to run as of the
13 date that a plaintiff’s right to recovery is a “certain” amount or is “capable of being
14 made certain by calculation.” *See Cal. Civ. Code § 3287(a); see also Evanston Ins.*
15 *Co. v OEA, Inc.*, 566 F.3d 915, 921-922 (9th Cir. 2009) (finding that “vesting”
16 requirement of Cal. Civ. Code § 3287(a) is satisfied when amount of damages is
17 certain at the time funds were expended). The Ninth Circuit has approved of
18 calculating prejudgment interest on fraudulent transfer recoveries under California’s
19 Uniform Fraudulent Transfer Act “from the date each transfer was made.” *Donell v.*
20 *Kowell*, 533 F.3d 762, 772 (9th Cir. 2008).

21 26. For the reasons set forth in the Findings of Fact, prejudgment interest is
22 awarded to the Trustee, as to each Transfer, at the rate of 7% per annum from the
23 date of each Transfer to the date of entry of judgment in this Action.
24

25 **V. The Trustee is Entitled to Post-Judgment Interest at the Prevailing Rate**

26 27. Pursuant to 28 U.S.C. § 1961(a), post-judgment interest “shall be allowed
27 on any money judgment in a civil case recovered in a district court.” 28 U.S.C.
28 1961(a); *see also In re Keefe*, 401 B.R. 520, 526 (B.A.P. 1st Cir. 2009) (awarding

1 post-judgment interest at federal statutory rate on trustee's state law fraudulent
2 transfer claims). Post-judgment interest "shall be calculated from the date of the entry
3 of the judgment, at a rate equal to the weekly average 1-year constant maturity
4 Treasury yield, as published by the Board of Governors of the Federal Reserve
5 System, for the calendar week preceding [...] the date of the judgment." 28 U.S.C. §
6 1961(a).

7 28. Accordingly, the Trustee is entitled to recover post-judgment interest
8 from the date of entry of judgment in this Action to the date of payment at the
9 prevailing legal rate.

10

11 **VI. Conclusion**

12 29. For the reasons set forth above and stated on the record, it is hereby
13 ORDERED that the Daniel Transfers, the Benjamin Transfers, the Malka Transfers
14 and the Shirah Transfers are avoided pursuant to 11 U.S.C. § 544(b)(1) and Cal. Civ.
15 Code §§ 3439.05, 3439.07(a)(1); and it is further ORDERED that judgment shall be
16 entered in favor of the Trustee on his Eleventh Claim for Relief as follows:

- 17 a. Against Daniel Namvar, in the amount of \$1,205,000.00 in principal
18 plus \$654,805.00 in prejudgment interest, for a total of
19 ~~\$1,860,498.30~~ ^{+ \$1,693.30}
~~\$1,859,805.00~~, plus post-judgment interest at the federal rate from
20 the date of judgment to the date the judgment is paid in full;
- 21 b. Against Benjamin Namvar, in the amount of \$1,660,000.00 in
22 principal plus \$902,212.00 in prejudgment interest, for a total of
23 ~~\$2,562,212.00~~ ^{+ \$955.08}
~~\$2,563,167.08~~, plus post-judgment interest at the federal rate from
24 the date of judgment to the date the judgment is paid in full;
- 25 c. Against Malka Namvar, in the amount of \$1,210,000.00 in principal
26 plus \$657,442.00 in prejudgment interest, for a total of
27 ~~\$1,867,442.00~~ ^{+ \$646.15}
~~\$1,868,138.15~~, plus post-judgment interest at the federal rate from
28 the date of judgment to the date the judgment is paid in full; and

d. Against Shirah Namvar, in the amount of \$1,212,000.00 in principal plus \$658,367.00^{+\$67,32} in prejudgment interest for a total of \$1,871,064.32, plus post-judgment interest at the federal rate from the date of judgment to the date the judgment is paid in full.

5 30. Any Conclusion of Law set forth herein that may qualify as a Finding of
6 Fact shall be equally considered as such.

7 Dated: 11/3 2014
8

Dated: 11/17, 2011

The Hon. Gary A. Feess
United States District Court Judge

11 CC: BANKRUPTCY COURT